Filed 8/17/04 Lynell W. v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LYNELL W., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	B174835 (Super. Ct. No. CK52052)

ORIGINAL PROCEEDING; petition for writ of mandate. Thomas E. Grodin, Temporary Judge. (Pursuant to Cal. Const. art. VI, § 21.) Petition granted.

Eva E. Chick for Petitioner.

No appearance for Respondent.

Office of the County Counsel, Larry Cory, Assistant County Counsel, Kenneth E. Reynolds, Senior Deputy County Counsel for Real Party in Interest Los Angeles County Department of Children and Family Services.

Law Offices of Anne E. Fragasso and Cameryn Schmidt for Real Parties in Interest Baby Boy W., Marques E., and Eric H.

Petitioner Lynell W. seeks extraordinary writ review of the juvenile court's order setting a hearing for the selection and implementation of a permanent plan for three of her children, eight-year-old Marques E., five-year-old Eric H., and one-year-old Baby Boy W.[1] Lynell W. contends (1) she did not receive reasonable reunification services, and (2) the court should have exercised discretion to extend services for an additional six months. We grant relief, on the separate and independent ground the Department of Children and Family Services (Department) and the juvenile court failed to comply with the statutory provisions governing placement of a sibling group.[2]

FACTS AND PROCEDURAL BACKGROUND

On April 28, 2003 the Department received a referral alleging Lynell W. was neglecting her six children.[3] A social worker visited a hotel where Lynell W. had a room, and was told Lynell W. had not paid her rent in almost a year, there was constant traffic in and out of the room, and there was "no doubt" she was selling and using drugs. The social worker interviewed Lynell W., who could not speak clearly, was alternately belligerent and tearful, and appeared to be under the influence of drugs. On May 1 Lynell W. agreed to participate in a family preservation program, and the social worker

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[1] The youngest child was detained just days after his birth, and appears as Baby Boy W. in all of the court's orders. For consistency, we will refer to him as Baby Boy W. although he was later named R.H. and so appears in some of the documents filed in the juvenile court.

[2] At our request, counsel for Lynell W., the Department, and the children submitted letter briefs addressing this issue. All of the parties agree reunification services were terminated without compliance with the sibling group statutory requirements, and the children support Lynell W.'s claim the court's order cannot stand.

[3] On February 2, 2004 the juvenile court terminated its jurisdiction over Lynell's three oldest children after the family court granted sole legal custody of them to their father. Accordingly, those children are not parties in this proceeding.

provided her with a comprehensive list of referrals for substance abuse and mental health treatment, food banks, and other community resources.

On May 5, 2003 the Department was informed that Lynell W. had prematurely delivered Baby Boy W. in a toilet at the hotel. When they were taken to the hospital, both Lynell W. and Baby Boy W. tested positive for opiates and cocaine, and Baby Boy W. was suffering from withdrawal symptoms and sepsis. Lynell W. immediately left the hospital, and the following day Baby Boy W. underwent a medical procedure for a life-threatening situation. On May 7 the children were detained by the Department. As of May 9, Lynell W. had not visited Baby Boy W. in the hospital or telephoned to inquire about his well-being.

On May 12, 2003 the Department filed a petition under section 300 of the Welfare and Institutions Code[4] seeking to declare the six children court dependents. Lynell W. did not appear at the detention hearing. In its report for the jurisdiction and disposition hearing, filed on June 25, 2003, the Department indicated Lynell W. had told the social worker she had a five-year history of substance abuse; she had suffered a relapse eight months earlier; she had left Baby Boy W. at the hospital because she had to get back to her other children who were alone at the hotel; she had a history of depression and had attempted suicide a few years ago; and she had a criminal history, having been twice incarcerated for a narcotics conviction. Lynell W. also told the social worker she had recently enrolled in an outpatient drug rehabilitation program, but the social worker had not been able to verify her enrollment, and Lynell W. had tested positive for cocaine twice during the preceding week.

On July 16, 2003 the court sustained the dependency petition upon Lynell W.'s plea of no contest, ordered the three oldest children placed in the home of their father, and ordered Marques E., Eric H. and Baby Boy W. suitably placed. The court ordered the Department to provide family reunification services to Lynell W., and ordered Lynell W. to participate in parenting classes, individual counseling, and drug counseling

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[4] All statutory references are to the Welfare and Institutions Code.

with random drug testing. A review hearing for Marques E., Eric H. and Baby Boy W. was set for January 14, 2004. Although the hearing should have been for the six-month review (§ 366.21, subd. (e)), the court's minute order erroneously referred to the 12-month hearing (§ 366.21, subd. (f)).

In a report for a progress hearing on October 23, 2003, the Department indicated that on July 23 Lynell W. and the father of Baby Boy W. had been arrested on a charge of transportation or sale of a controlled substance, and Lynell W. remained incarcerated with a criminal court hearing scheduled October 24. Lynell W. was transported to juvenile court on October 23. The court ordered its prior orders to remain in effect, but permitted Lynell W. to write letters to the children through the social worker. The court continued the case to January 14, 2004, again making reference to the hearing as for the 12-month review.

The Department's report for January 14 was titled as one for the 12-month hearing as to Marques E., Eric H. and Baby Boy W.[5] The report indicated Lynell W. had been convicted of possession of a controlled substance, and was incarcerated in the state prison where she would serve at least a year-and-a-half of a sentence of three years. Lynell W. had participated in parenting classes while in the county jail, but had not completed the parenting program before she was transferred to the state facility. Lynell W. had also completed a group counseling program, and although it was beneficial it did not address issues of drug abuse and personal development. Lynell W. was maintaining regular contact with the children by letters sent through the social worker, but there had been no visitation other than from a single visit in the county jail which had been arranged by the social worker. The Department recommended termination of reunification for Lynell W., and the setting of a section 366.26 selection and implementation hearing as to Marques E., Eric H. and Baby Boy W. On January 14, 2004 the hearing was continued to January

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[5] The Department's notices of the hearing also specified it was the 12-month review hearing.

29 (again as a 12-month hearing), because the Department's report had not been mailed to Lynell W., and she had not been transported to the court.[6] On January 29 the matter was set as a contested 12-month hearing on March 8. On March 8 the hearing was continued to April 19, as Lynell W., still in custody, had not been transported to court. All of the court's minute orders, and the Department's notices of the hearings, referred to the 12-month review hearing. As of April 19, Marques E. and Eric H. had recently been placed together in foster care, with Baby Boy W. in a separate placement. There was also information that a maternal aunt (N.W.) might be willing to care for Baby Boy W. and possibly Eric H. as well. The social worker recommended continued long-term foster care for the children in their current placements, but also stated she would be meeting with the foster parents to discuss the possibility of the more permanent plans of legal guardianship or adoption.

At the commencement of the contested hearing on April 19, the court announced the matter was being heard as a "[section 366].21, [subdivision] (f)" contest. The Department's report and several documents relating to Lynell W.'s participation in programs were received into evidence, and there was no witness testimony. Counsel for the Department requested reunification services for Lynell W. be terminated, noting that Lynell W. had only partially complied with her case plan. In addition, because the record showed that as of October 2003 she had a year-and-a-half remaining on her sentence, Lynell W. would be unable to comply with her case plan and obtain custody of the children with an additional six months of services.[7] Counsel for the children joined in the request for termination of reunification, noting that the children were initially detained in May 2003, and Lynell W. had received almost 12 months of reunification services.

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[6] On January 14, the court granted a request to terminate jurisdiction over the three oldest children subject to receipt of a family law order.

[7] At the conclusion of her argument, the Department's counsel stated: "Pursuant to 366.21 - - .21(f), the Department is requesting that the Court terminate mother's family reunification services and set a .26 hearing . . . . And I'm sorry. This is a .21(e) hearing - - pursuant to 366.21(e). Submitted."

Counsel for Lynell W. did not challenge the adequacy of reunification services, but requested extension of reunification for an additional six months. Counsel urged Lynell W.'s compliance with her case plan was substantial, the Department's report indicated all of the children wished to be reunified with her,[8] and Lynell W. had indicated she would be released in November 2004, which would be just a little bit beyond the additional six months. Counsel added, " . . . we are only at the .21(e) hearing." When asked by the court whether counsel had anything official concerning Lynell W.'s projected release date, counsel stated that she did not.

At the conclusion of argument, the court found that Lynell W. had not fully complied with her case plan, return of the children to Lynell W.'s custody would create a substantial risk to their well-being, and the Department had made reasonable reunification efforts. The court further noted Lynell W. had received almost a year of reunification services, she was in custody, and even accepting her statement that she would be released from incarceration in November, her release would take place beyond the 18-month statutory limit for reunification. The court proceeded to terminate reunification and set the matter for a hearing pursuant to section 366.26. The court also ordered the Department to address possible placement of the children with N.W. in its report for the section 366.26 hearing.

DISCUSSION

1. *Lynell W. Forfeited Her Right to Assert Inadequacy of Reunification Services By Failing to Raise the Issue in the Juvenile Court*

At the contested hearing on April 19, 2004, Lynell W. did not contend that the services provided to her by the Department were inadequate, but claimed only that she had participated regularly in her required programs, and that with the services already in place she would be able to care for the children upon her release from incarceration. By

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[8] There is no support in the record for this assertion, and of course Baby Boy W. was far too young to be able to express any such wish.

failing to object to the adequacy of reunification services in the juvenile court, Lynell W. has forfeited her right to assert error in this court. (*In re Kevin S.* (1996) 41 Cal.App.4th 882, 885; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339; *In re Christina L.* (1992) 3 Cal.App.4th 404, 416.)

2. *Failure to Comply with the Statutory Requirements for Sibling Groups Is Reversible Error*

When children who are over the age of three are removed from parental custody, such as Marques E. and Eric H., these children and their parents are entitled by statute to a minimum of 12 months of reunification services. (§ 361.5, subd. (a)(1).) In the interest of expediting permanency and improving the chances of adoption for very young children, the Legislature has limited the reunification period to six months for children, such as Baby Boy W., who are under three on the date of the initial removal. In the case of a sibling group that includes children in both categories, at the six-month hearing the court may split up the siblings by expediting permanency for the younger sibling, expedite permanency for the entire sibling group (thus reducing the older siblings' minimum reunification period to six months), or continue the case to the 12-month hearing for all of the children (thus increasing the reunification period for the younger sibling). (§ 366.21, subd. (e), 4th par.) The purpose of these provisions is to give the court flexibility to maintain a sibling group together in a permanent home.[9]

In furtherance of the societal interest in placing and maintaining a sibling group together in a permanent home, the Legislature has imposed strict requirements before the court may make a determination at the six-month hearing to schedule a section 366.26 hearing for some or all of the sibling group members. Section 366.21, subdivision (e), paragraph four provides that in making its determination the court must review and consider the Department's report. Factors the report must address, and the court must consider, include the following: (a) whether the children were removed from parental

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[9] Like the Legislature, the courts have recognized the right of children to the society and companionship of their siblings. (See, e.g., *In re Marriage of Williams* (2001) 88 Cal.App.4th 808, 814-815.)

care as a group; (b) the closeness and strength of the sibling bond; (c) the siblings' ages; (d) the appropriateness of maintaining the group together; (e) the detriment to each child if sibling ties are not maintained; (f) the likelihood of finding a permanent home for the group; (g) whether the group is currently placed together in a preadoptive home or has a concurrent plan goal of legal permanency in the home; (h) the wishes of each child whose age and condition permits a meaningful response; and (i) the best interest of each child in the group. Additionally, the court must specify the factual basis for its finding that it is in each child's best interest to schedule a section 366.26 hearing for some or all of the members of the sibling group.

In this case, neither the Department's report nor the court's findings and order complied with the statutory requirements.[10] The Department's report failed to address the closeness and strength of the bond between the children; the appropriateness of maintaining the children together; the detrimental effect of severing sibling ties; the likelihood of finding a permanent home for the group; or the wishes of the two older children, who may have been able to indicate their preferences. In neither its oral ruling nor its order did the court indicate it had given consideration to the factors listed in the statute.

In view of the deficiencies in the Department's report and the court's failure to comply with the statutory requirements, we conclude there was error in the court's order terminating reunification and setting a section 366.26 hearing, and the error requires remand for compliance with the requirements and a new six-month review hearing. (See *Abraham L.* v. *Superior Court* (2003) 112 Cal.App.4th 9, 15.)[11]

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[10] This may have occurred because, as we have noted, the Department and the court were under the mistaken impression the case had proceeded to the 12-month stage.

[11] We need not decide whether the harmless error doctrine applies to the failure to comply with the sibling group statutory requirements, and if so whether *Chapman* (harmless error beyond reasonable doubt) or *Watson* (reasonable probability the outcome would have been different but for the error) applies. (*Chapman* v. *California* (1967) 386 U.S. 18, 24; *People* v. *Watson* (1956) 46 Cal.2d. 818, 836.) The court's order reducing the statutory reunification period for the two older children from 12 months to six months could only be made upon compliance with the sibling group requirements, and there is no

DISPOSITION

The petition is granted. The matter is remanded to the juvenile court, which is directed to proceed as follows: The court shall vacate its order of April 19, 2004 terminating reunification and setting a hearing pursuant to section 366.26; set a new six-month review hearing no sooner than 90 days after the date of its new order; order the Department to prepare a supplemental report for the hearing, specifically addressing (among other things) the factors listed in paragraph four of section 366.21, subdivision (e); and order reinstatement of family reunification pending the new six-month hearing.[12]

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ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.

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evidence in the record showing that premature termination of reunification was in each child's best interest given the unsettled state of the children's placements and the uncertainty as to the appropriate permanent plans. Under these circumstances, even under the *Watson* standard we find there was a reasonable possibility the outcome would have been different but for the error.

[12] As Lynell W.'s children were removed from her custody on May 7, 2003, she will continue to receive reunification services beyond the 18-month statutory limit. (§ 366.22, subd. (a).) It thus becomes unnecessary to consider Lynell W.'s contention reunification services should have been extended for an additional six months.